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# “LANGUAGE-QUALIFYING” JURIES TO EXCLUDE BILINGUAL SPEAKERS\*

Marina Hsieh†

## INTRODUCTION

When I was asked to participate in this conference I accepted—despite the fact that I am not a “regular” in the family of jury scholars—because I could not resist the invitation to share with the social science community a “wish list” of issues needing more empirical research. As I considered the subject of the selection and nullification of juries, I immediately thought of *Hernandez v. New York*,<sup>1</sup> in which the Supreme Court allowed disqualification of Spanish-speaking jurors for cause, despite the potential equal protection concerns suggested by *Batson v. Kentucky*.<sup>2</sup> *Hernandez* has bothered me for quite a while, not only because of its questionable constitutional conclusions, but also because of what it implies about the attitude the law takes toward multilingualism in our courts. This Essay proposes that we reframe one of the

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\* ©2001 Marina Hsieh. All Rights Reserved. This paper was presented at a plenary panel on *The Law's Quest for Impartiality: Juror Selection and Juror Nullification*, at “The Jury in the Twenty-First Century: An Interdisciplinary Conference,” Brooklyn Law School, New York, Oct. 6, 2000. The title is an intentional allusion to the creation of “death-qualifying” juries by striking from service in capital cases potential jurors who oppose the death penalty in all cases. See, e.g., *Witherspoon v. State of Ill.*, 391 U.S. 510 (1968).

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<sup>1</sup> 500 U.S. 352 (1991).

<sup>2</sup> 476 U.S. 79 (1986).

evidentiary premises on which disqualification of bilingual jurors<sup>3</sup> is currently justified by post-*Hernandez* courts. In addition, because we lack data on virtually every aspect of the needs of bilingual participants in our court system, this Essay identifies some issues for additional research about bilingual jurors.

## I. THE CHALLENGE OF BILINGUALISM IN COURTS

The phenomenon of bilingual courtrooms is clearly upon us, to varying degrees and in varying forms, depending on the region of the country. One in seven Americans over the age of five does not use English at home, and of that number, forty-four percent—almost fourteen million people—speak English less than “very well.”<sup>4</sup> This number had grown by sixty-four percent for Spanish speakers over the previous decade, and by over 100 percent for various Asian and Pacific Islander groups.<sup>5</sup>

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<sup>3</sup> For the sake of simplicity, I will use the term “bilingual” in this paper to refer to a juror proficient in both English and a non-English language in which original testimony will be given. In some instances, additional foreign languages may be spoken, but the same analysis applies to bilingual or multilingual jurors who might understand any original testimony.

<sup>4</sup> U.S. Bureau of the Census, *Language Use and English Ability, Persons 5 Years and Over, by State: 1990 Census of Population*, at CPHL-96 (1990), available at <http://www.census.gov/population/socdemo/language/table1.txt> (last visited Mar. 30, 2001). 4,826,958 people over age five answered that they speak English “not well” and 1,845,243 answered “not at all.” *Id.* Over half of those speak Spanish as their primary language, but there are also over a million speakers each of French, German, Italian, and Chinese, thousands of whom speak English less than well. U.S. Bureau of the Census, *Detailed Languages Spoken at Home and Ability to Speak English for Persons 5 Years and Over—50 Languages with Greatest Number of Speakers: 1990 Census of Population*, at CPHL-133 (1990), available at <http://www.census.gov/population/socdemo/language/table5.txt> (last visited Mar. 30, 2001).

<sup>5</sup> In the decade between 1980 and 1990, these numbers had grown 64% for Spanish, 99.5% for Chinese, 138.6% for Korean, and 94.7% for Vietnamese speakers. *Cf. id.* with U.S. Bureau of Census, *Characteristics of the Population, Detailed Population Characteristics: 1980 Census of the Population*, vol. 1, ch. D, Part 1, at Tbl. 256 (1980).

Preliminary figures from the 2000 U.S. Census estimate the Hispanic population increased 57% from 1990 to 2000 and the Asian population by 40%, while the overall U.S. population grew only 13%. *Cf.* U.S. Dept. of Commerce, *General Population Characteristics: 1990 Census of the Population*, at CP-1-1, at 3 (Tbl. 3: Race and Hispanic Origin), available at <http://www.census.gov/prod/cen1990/cp1/cp-1-1.pdf> (last visited Apr. 18, 2001), with Elizabeth M. Grieco & Rachel C. Cassidy, *Census 2000 Brief: Overview of Race and Hispanic Origin*, at 3 & 9 (Tbls. 1 & 7) (Mar. 2001),

Language interpreters were used in the federal court system 190,127 times last year, almost three times as often as a decade ago.<sup>6</sup> Clearly, to provide meaningful access to justice, many court proceedings require interpretation of multiple languages in order to be comprehensible to all of the participants including defendants, parties, judges, and juries.<sup>7</sup> This Essay focuses on how multilingual proceedings impose special limitations on jurors with bilingual skills.

There are already great pressures on the average foreign language speaker in the court system. This Essay does not address the ongoing practice of disqualifying jurors for *lack* of English proficiency, other than to note that insufficient command of English exacerbates the already disproportionate disqualification of immigrants and racial and ethnic minorities due to lack of citizenship.<sup>8</sup> It is thus particularly ironic that these already underrepresented populations are further barred

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available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf> (last visited Apr. 18, 2001).

<sup>6</sup> Interpreters were used in 190,127 events in federal court in the fiscal year ending September 30, 2000, compared to 66,644 events in calendar year 1990. Telephone interview with Richard Carelli, Senior Public Affairs Specialist, The Administrative Office of the U.S. Courts (Feb. 16, 2001) (unpublished data from the District Court Administration Division).

<sup>7</sup> Of course, minimal access often falls far short of actual equality of treatment. Impediments to full communication, the burdens of translation services, bias, and cultural gaps create a variety of disadvantages to defendants, witnesses, and jurors who lack English proficiency. See Judge Paul J. DeMuniz, *Introduction to IMMIGRANTS IN COURTS* 3, 4-6 (Joanne I. Moore ed., 1999); Miguel A. Mendez, *Lawyers, Linguistics, Story-Tellers, and Limited English Speaking Witnesses*, 27 N.M. L. REV. 77, 79-87 (1997) (linguistic issues in courtroom presentations and English-language assessments); Michael B. Shulman, Note, *No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175 (1993) (addressing obstacles to competent and unbiased interpretation services); *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 OR. L. REV. 823, 835 (1994) [hereinafter *Oregon Report*] ("Many who came before us said that, because of cultural and language differences, they did not receive justice. The best they could hope for, they said, was to experience the process of justice even though it was unexplained and unintelligible.").

<sup>8</sup> See 28 U.S.C. § 1865(b)(1)-(3) (2000) (stating qualifications for jury service). Non-citizenship and insufficient English exclude an estimated 37.5% of California's Latino/a population from jury service. See CAL. CIV. PROC. CODE § 203(a)(1),(a)(6) (West 1999) (listing exceptions to persons qualified to be trial jurors); 1997 Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts at 196 (1997). In Puerto Rico, the United States Federal court requires English proficiency, but has allowed voir dire to be conducted in Spanish. *United States v. Flores-Rivera*, 56 F.3d 319, 326 n.4 (1st Cir. 1995).

from juries because the law condones disqualification of not only the juror who is *deficient* in English, but, under certain circumstances, exclusion of the juror who is *proficient* in English and another language.

That juror was the subject of the 1991 Supreme Court case, *Hernandez v. New York*, in which a prosecutor struck two Spanish-surnamed, bilingual jurors solely because of the state's concern that they might not listen to, follow, and accept the Spanish-to-English interpreter as the final arbiter of the testimony of Spanish-speaking witnesses.<sup>9</sup> A plurality of the Court held that the equal protection guarantees of the Fourteenth Amendment to the Latino defendant were not violated by allowing strikes for this reason, despite the predictable disproportionate effect on minority and ethnic jurors.<sup>10</sup> Circuit courts have followed *Hernandez* on the facts of similar cases, accepting an ability to understand original, non-English testimony of a witness as a legitimate, non-race-based reason for a peremptory strike of a juror.<sup>11</sup>

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<sup>9</sup> 500 U.S. 352 (1991). The prosecutor stated:

[M]y reason for rejecting . . . these two jurors . . . is I feel very uncertain that they would be able to listen and follow the interpreter . . . I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.

*Id.* at 356-57 (citing App. at 3-4).

<sup>10</sup> The four-Justice plurality opinion by Justice Kennedy rejected foreign-language ability as a per se pretext for ethnicity or the cause in this case, although it allowed for the possibility that "a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination." *Hernandez*, 500 U.S. at 371-72. However, the concurring opinion of Justice O'Connor, joined by Justice Scalia, took a much narrower view of defendants' potential constitutional challenges, sharply distinguishing "disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is." *Id.* at 375 (O'Connor, J., concurring).

<sup>11</sup> See, e.g., *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir.), *cert. denied*, 513 U.S. 969 (1994); *United States v. Munoz*, 15 F.3d 395 (5th Cir.), *cert. denied*, 511 U.S. 1134 (1994).

This Essay will not revisit these constitutional issues, which many others have already explored, or explore other issues of (un)fairness to defendants and non-English-speaking witnesses.<sup>12</sup> Instead, this Essay will focus on selection and disqualification of jurors, specifically, jurors who are fluent in a non-English language that will be used in original testimony. I conclude that the practice of disregarding original non-English testimony that is endorsed in the *Hernandez* line of cases interferes with the truth-seeking goals of our courts, and undermines the function of the juror.

## II. THE PERILS OF INTERPRETED TESTIMONY

The relevance of a juror's ability to understand original non-English testimony stems from the relative values assigned to the original non-English testimony of a witness or party, on the one hand, and, on the other hand, the interpreter's English rendition of that raw testimony. Ideally, these would be equivalent; the interpreter in a courtroom could listen to the raw testimony and provide an invisible, exact conversion of its meaning into English. In this model, interpreters are courtroom personnel who exercise expert skills, but do not act as experts; they do not add content or meaning, but are merely the neutral device by which another language is processed into English. The court interpreter is like a second court reporter, who is present, but not center stage, simply processing the content presented by witnesses without alteration or addition or distraction. Just as the court reporter's transcript is the official record of the words spoken in court, not the actual words themselves,<sup>13</sup> the court

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<sup>12</sup> See, e.g., Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993) (describing *Hernandez* as a dilution of the line of *Batson* protections); Alfredo Mirande, "Now that I Speak English, No Me Dejan Hablar [I'm Not Allowed to Speak]": The Implications of *Hernandez v. New York*, 18 CHICANO-LATINO L. REV. 115 (1996) (arguing that *Hernandez* is racial discrimination and counter to linguistic research and experience of bilingual speakers); Joel H. Swift, *The Unconventional Equal Protection Jurisprudence of Jury Selection*, 16 N. ILL. U. L. REV. 295 (1996) (describing *Hernandez* as a retreat by the Court from a preference for the Equal Protection Clause to a preference for the peremptory challenge).

<sup>13</sup> 28 U.S.C. § 753(b) (2000) ("No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the

interpreter's English version of the testimony is the basis of the reporter's transcript, not the original non-English testimony. Thus, for official purposes, the original testimony ultimately has zero presence in the record, being entirely supplanted by the English interpretation.

This complete shift of the basis of the record from the original to the interpreted testimony puts tremendous pressure on the accuracy of the interpretation. This "interpretation" of a foreign language into English is far more significant than the "translation" made by the court reporter from oral to written testimony in English because the jurors themselves are not able or even allowed to evaluate the raw testimony as originally spoken by the witness. The fidelity of the officially accepted interpretation is unverifiable for at least two reasons: (1) because a juror not fluent in the language of the original testimony is unable to comprehend the original testimony, she cannot compare it to the oral English interpretation or the written English transcript, and (2) when a juror is instructed to consider only the official English interpretation, in principle she is not allowed to even listen to, much less comprehend, the meaning of the original non-English testimony. In contrast, although the written transcript of the court reporter takes precedence over the oral testimony for the purpose of the official record, jurors are routinely expected to consider and make their judgments on the original oral testimony as they heard it; the recording is often never provided or read back to them.

A threshold issue in proving adequate interpretation services is the problem of supply. Although we need far more systematic data in this area,<sup>14</sup> it appears that the system is not meeting the ever-increasing demand for sufficiently trained court interpreters. There are vast differences in the requirements and resources of federal and state courts, urban

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reporter or other individual designated to produce the record.").

<sup>14</sup> The National Association of Judiciary Interpreters and Translators has noted, "The collection and reporting of reliable statistics regarding interpreter usage is essential to the management of court interpreting services. Unfortunately, it is also a huge problem, because methods of defining and counting interpreter cases vary from court to court, and in some instances the record-keeping is sloppy or nonexistent." National Association of Judiciary Interpreters and Translators website, *FAQs*, at <http://www.najit.org/faq.html#q5> (last visited Mar. 30, 2001).

and rural areas, and criminal and civil trials. At the federal level, the Court Interpreters Act limits interpretive services to in-court proceedings in criminal cases or in civil matters brought by the United States.<sup>15</sup> Even under this narrow requirement, the federal courts last year required interpreters for seventy-seven different languages.<sup>16</sup> The proficiency of these interpreters surely varies. To date, the Administrative Office of the U.S. Courts has developed certifications in only three languages, Spanish, Navaho, and Haitian Creole, although the Court Interpreters Act was passed in 1978.<sup>17</sup>

The regulation and certification of state interpreters is even more haphazard. As of 1999, only seventeen states tested the translation abilities of court interpreters in any language; only nineteen states had some system of certifying interpreters, and even those did not certify many commonly used languages.<sup>18</sup> Funding requirements for training, certification, and services are significant, and the resources have not kept pace with the increased need. For example, in California the number of interpreters dropped thirty-nine percent in the second half of the 1990s, a fact that the Bay Area Court Interpreters Association attributes to a decade of low and stagnant compensation levels.<sup>19</sup> This problem is even greater for smaller states and localities. Absent adequate ranks of trained, certified interpreters, it is not surprising that studies of state courts reveal an almost random recruitment

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<sup>15</sup> 28 U.S.C. §§ 1827(a), 1828(a) (2000).

<sup>16</sup> See Telephone interview with Richard Carelli, *supra* note 6. The overwhelming majority of interpretations were from Spanish (179,271 events), followed by Mandarin (2,092), Vietnamese (931), Cantonese, Russian, Korean, and Arabic. *Id.*

<sup>17</sup> Michael S. Arnold, *Lawyers Say Justice Lost in Translation: Many Court Interpreters Called Inaccurate*, THE WASH. POST, Sept. 30, 1993, at M1 (reporting that 96% of applicants fail the written or oral examinations; by 1993 only 440 Spanish-language interpreters had been certified under that program).

<sup>18</sup> Joanne I. Moore & Judge Ron A. Mamiya, *Interpreters in Court Proceedings*, in IMMIGRANTS IN COURTS, *supra* note 7, at 30-31.

<sup>19</sup> See *Davis Cuts Court Interpreter Funds*, ASIAN WEEK, July 8, 1999, at 10. As of January 2000, the federal courts pay \$305 per day to per diem interpreters; for nine years before that the per diem was \$250 per day. National Association of Judiciary Interpreters and Translators website, *FAQs*, question 14, *supra* note 14 ("In some parts of the United States the pay is dismal; in others it is more reasonable.") The maximum reimbursement for court interpreters in Mississippi was \$5 per day until 2000 when a new state law allowed "reasonable" fees, but most local governments don't have the money." *New Law Raises Fees for Court Interpreters*, ASIAN WEEK, Oct. 12, 2000, at 6.



process, with no uniform inquiry by judges into the impartiality or competence of interpreters. As one researcher summed up:

The use of not only bailiffs, secretaries, building janitors, courthouse personnel, jurors, arresting officers, probation officers, prison guards, civil plaintiffs, district attorneys and other counsel, prosecution witnesses, young children, friends and relatives of victims or witnesses, prison inmates, and defendants and codefendants has been documented.<sup>20</sup>

With such disparate levels of training and certification, we must question the accuracy of much courtroom interpretation. The answer is difficult to quantify. Lack of empirical data on the quality of interpretation in various court settings is exacerbated by the absence of systematic recording or preservation of original foreign-language testimony for later comparison.<sup>21</sup> A study in the District of Columbia Circuit reported that out of attorneys who had tried a case in a District of Columbia federal court involving testimony of a non-English speaker, sixteen percent of White, nineteen percent of African-American, and twenty-five percent of Latino/a attorneys thought the interpretation was less than adequate.<sup>22</sup> Additional anecdotal evidence from judges, lawyers, law clerks, news reporters observing court sessions, auditors for court administrations, and the examinations of interpreters who had already regularly served in the courts illustrate the magnitude of some errors. For example:

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<sup>20</sup> Alice J. Baker, *A Model Statute to Provide Foreign-Language Interpreters in the Ohio Courts*, 30 U. TOL. L. REV. 593, 603-04 & nn.62-76 (1999).

<sup>21</sup> Even in federal court, electronic sound recordings of interpreted portions of judicial proceedings are not required, with the exception of grand jury proceedings on motion of the accused. 28 U.S.C. § 1827(d)(2) (2000) (allowing judicial discretion whether to require sound recordings).

<sup>22</sup> *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 296 (1996) [hereinafter *D.C. Circuit Task Force*].

The witness says:	The interpreter says:
"Someone began to push me with a black tow truck. Later, he began to move me."	"Someone began to honk at me, and I moved." <sup>23</sup>
I don't even have "ten cents."	I don't even have "ten kilos." <sup>24</sup>
"shoot"	"kill" <sup>25</sup>
I was going to "chat with" the victim.	I was going to "kill" the victim. <sup>26</sup>
I pronounce you husband and wife.	Now you are hunted. <sup>27</sup>
"Do you remember the day [defendant] sexually assaulted you?"	"Do you remember the day [defendant] made love to you?" <sup>28</sup>
Defense attorney (in English): "Did the robber have facial hair?"	Hmong Interpreter to witness: "Was his hair long?"
Witness (in Hmong): "Same length as mine."	English interpreter to court: "The hair the same." <sup>29</sup>
"as for the Vietnamese, I never associate with them"	"no" <sup>30</sup>

<sup>23</sup> Moore & Mamiya, *supra* note 18, at 29-30 (from a candidate's answer on a consecutive interpreting section of the Washington State court interpreter certification exam; although the candidate failed the test, this person had already interpreted for hundreds of misdemeanor and felony cases).

<sup>24</sup> Alain Sanders, *Libertad and Justicia for All*, TIME, May 29, 1989, at 65, analyzed in Shulman, *supra* note 7, at 176 & nn.1-5.

<sup>25</sup> Moore & Mamiya, *supra* note 18, at 39 (citing Ken Kolker, *Trial and Errors*, GRAND RAPIDS PRESS, Feb. 21, 1993, reporting on a 1992-93 audit of the Michigan courts by the press).

<sup>26</sup> D.C. Circuit Task Force, *supra* note 22, at 297-98 (fortunately, an audio-tape record of the defendant's statement had been made in this Superior Court case).

<sup>27</sup> Ruth Hammond, *Lost in Translation for Immigrants in Court, Bad Interpreters Rig the Jury*, THE WASH. POST, Oct. 24, 1993, at C3.

<sup>28</sup> *Id.* In this St. Paul case, the reporter reviewed audiotapes of a rape trial in which the accusers, married women, spoke only Hmong. The two defendants claimed that the sex was consensual, but that the community had pressured the women to have the defendants punished as severely as such adultery would have been punished in Laos. Hammond pointed out that "[c]omplicating the interpretation was a widespread belief in the Hmong community that the English word 'rape' is an appropriate cultural translation for acts that violate the Hmong sexual code, such as having consensual sex with a married woman." *Id.* Beyond this subtlety, Hammond further observed that "nearly a third of the question-and-answer exchanges conducted in English-Hmong were so altered by interpreters that jurors were substantially misled about what the witnesses' actual testimony was . . . [A] correct interpretation of an exchange seldom occurred." *Id.*

<sup>29</sup> Miranda Ewell, *At the Mercy of Others' Voices*, SAN JOSE MERCURY NEWS, Dec. 17, 1989, at 17A. In this case, the press exposed errors by hiring their own interpreters to observe proceedings. The defendant was hampered by dual interpretations: most of the testimony was in Hmong, interpreted into English for the court and jury, and then reinterpreted into Vietnamese for the defendant.

<sup>30</sup> *Id.*

Even the most fully trained and skillful interpreters incorporate ambiguities in interpretation because language inherently involves understanding and interpretation. Consider how an English-speaking juror must listen and then assign meaning to every phrase of original English testimony she hears. We select our appropriate meanings based not only on rules of grammar and usage, but also on an experience-linked knowledge of how to interpret English sensibly in a particular context. Lawrence M. Solan, among others, has written about the assistance that linguistic experts can bring to even all-English cases.<sup>31</sup> They can help identify and explain how English speakers assign appropriate interpretations to statutory and other language within a range of possible meanings.

Inherent ambiguities will persist, in some cases, with or without expert assistance. For example, recall the case of Derek Bentley in Great Britain. A mildly retarded nineteen-year old, he was already in the custody of London police for breaking into a warehouse when his sixteen-year old co-offender, who had a gun, confronted an officer. Bentley shouted, "Let him have it," and his friend shot and killed the officer. Bentley was convicted of murder on a theory of constructive malice, and hanged in 1953. His culpability was consistent with an interpretation of his last statement as an incitement to the trigger man to shoot the officer, but would be unsupported if his last words were an appeal for his friend to hand his weapon over to the police.<sup>32</sup> How should an interpreter *interpret*, and therefore *translate*, the word "it"—as a "gunshot" or as "the gun"?

These inherent ambiguities of interpretation make formal training and certification all the more necessary. Mere fluency plus some specialized vocabulary study is insufficient. For example, a simple, unintentional decision to include or omit polite forms of address, such as not translating "Señor" into "Sir" and omitting the introductory formality, can have a

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<sup>31</sup> See Lawrence M. Solan, *Can the Legal System Use Experts on Meaning?*, 66 TENN. L. REV. 1167 (1999).

<sup>32</sup> See Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 245-46 (1989); Christopher J. Meade, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 754 n.120 (1996).

tremendous impact on the jurors' impression of a witness' testimony.<sup>33</sup> When bilingual reporter Ruth Hammond personally reviewed tapes and transcripts of a St. Paul, Minnesota rape trial involving key testimony in Hmong, she observed,

At times, the interpreters usurped the role of the witness, providing explanations that had not been offered in Hmong, or changing details to conform with other witnesses' testimony. At other times, they usurped the roles of the prosecuting and defense attorneys, independently asking questions the attorneys had never posed in order to help the witness formulate a more detailed response. They also usurped the role of the judge when they struck answers they apparently deemed nonresponsive by not interpreting them. None of this was apparent to the lawyers, the judge or the jury, of course; nor does any of it appear in the trial transcripts.<sup>34</sup>

This interpretive function is probably the root of the frequent overuse of the word "kill" for lesser words like "chat" or "shoot." However unconscious or well-intentioned, an interpreter always intervenes between the original testimony and the jurors' inferences.<sup>35</sup>

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<sup>33</sup> See, e.g., SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 158-69 (1990). Interpreters have the power to change the impact of a non-English speaking witness through use of politeness, hedging, and informality. In Seligson's study, 551 mock jurors, divided into two groups, heard tape recordings of a single Spanish speaking witness. Both groups heard the same accurate English interpretation, with one difference: in one group the interpreter would translate polite forms of address, for example, "yes, sir" when the witness said "si, Señor," while the other group's interpreter would simply say "yes." The jurors in the second group rated the witness less convincing, less competent, less intelligent, and less trustworthy than did jurors in the first group who heard the interpreter's politeness markers. The differences were statistically significant: less than a 0.1% chance that they were due to chance. *Id.* at 161-62. The 217 Hispanic jurors in the two groups (97% of whom spoke Spanish) found the witness equally convincing and trustworthy in both interpretations, although those who heard the "polite" interpretation rated the witness more competent and trustworthy. *Id.* at 163.

<sup>34</sup> Hammond, *supra* note 27, at C3.

<sup>35</sup> Reid Hastie provided an example of how jurors must construct a story line out of disparate bits of English testimony by many witnesses. See Reid Hastie, *Emotions in Jurors' Decisions*, 66 BROOK. L. REV. 991 (2001). As testimony keeps accumulating, the conscientious interpreter might well say something like, "The pregnant woman went to weld the rusty beam in the house that was crushed by the rock." That might put it all together for a jury, but clearly adds and changes the meaning of the original testimony. *Id.*

Any assumption that interpreted testimony in our courtrooms today is largely adequate and accurate is a fiction. We can continue to accept that fiction in the same way that we operate on a formal assumption that the poor get the same level of legal services as the rich, or that race is never a factor in the courtroom, or we can engage directly with the difficulties that interpreted testimony presents.

### III. EXCLUSION OF USE OF FOREIGN-LANGUAGE TESTIMONY AND BILINGUAL JURORS

Given the growing need for language interpretation in our courtrooms, and the structural problems that it presents, what steps can we take to improve accuracy and fairness? An immense amount of additional effort and revenue must be devoted to training, certifying, and employing interpreters in courtrooms at every level.<sup>36</sup> We should also step back and reconsider the wisdom of our current, limited view of the relevant evidentiary record. Limiting judicial recognition to interpreted English testimony, completely disregarding the original foreign-language testimony, irrationally hampers truth-seeking. It disqualifies bilingual jurors who might best understand both the evidence and the cultural norms of the witnesses and parties.

Professor Norbert Kerr and his colleagues, when faced with potential juror subversion in another context, succinctly framed our range of remedies as "between greater candor or thicker blindfolds."<sup>37</sup> I vote for candor, but let us start with the blindfolds. Consider three methods of managing a bilingual

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<sup>36</sup> In addition to the growing number of court-sponsored self-studies, see, e.g., *Oregon Report*, *supra* note 7; *D.C. Circuit Task Force*, *supra* note 22, many professionals and commentators have explored the need for constitutional and/or statutory rights to competent certified interpreters, and have made useful suggestions in this regard. See Baker, *supra* note 20; Charles M. Grabau & David-Ross Williamson, *Language Barriers in Our Trial Courts: The Use of Court Interpreters in Massachusetts*, 70 MASS. L. REV. 108 (1985); Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899 (2000). See also Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1 (1997).

<sup>37</sup> Irwin A. Horowitz, Norbert L. Kerr & Keith E. Neidermeier, *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK L. REV. 1207 (2001).

juror in a trial in which testimony will be presented in a non-English language that the juror understands: (1) the current system endorsed by *Hernandez*, that allows the juror to be struck for fear that he will not disregard the original foreign language testimony; (2) a system that seats bilingual jurors, but more rigorously screens them from the original language testimony; or (3) a system that not only accepts bilingual jurors for service, but allows each juror to fully consider all original and interpreted evidence to the fullest extent of his ability.

#### A. *The Current System*

The *Hernandez* Court accepted the peremptory strike of a bilingual juror whom the lawyer suspected was unwilling or unable to be faithful solely to the English interpretation as compared to the original foreign language testimony, finding the lawyer's reason "correspond[ed] to a valid for-cause challenge."<sup>38</sup> This reasoning was predicated on the Court's acceptance, without question, of the practice of entirely supplanting original foreign language testimony with English interpretations. This practice is in tension with ordinary evidentiary principles, and inhibits the courts' ability to uncover the truth.

Courts routinely instruct all jurors to disregard non-English testimony and to attend only to the English interpreter.<sup>39</sup> Some courts appear doubtful about the efficacy of their instructions in this regard. For example, in justifying the strikes of bilingual jurors in *Pemberthy v. Beyer*, the Court of Appeals for the Third Circuit argued:

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<sup>38</sup> *Hernandez*, 500 U.S. at 362-63.

<sup>39</sup> See, e.g., *Diaz v. Delaware*, 743 A.2d 1166, 1175 (Del. 1998), holding that in trials involving foreign language testimony and English translation, when one or more jurors are bilingual, Delaware judges should give instructions similar to the following federal model:

"Languages other than English may be used during this trial. The evidence you are to consider is only that provided through the official court (interpreters) (translators). Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in English (interpretation) (translation). You must disregard any different meaning of the non-English words."

*Id.* at 1175 (citing MODEL CRIMINAL JURY INSTRUCTIONS, 9<sup>th</sup> Circuit §§ 1.12, 3.18).

[T]he following mental experiment is instructive. Readers whose primary language is English should imagine that they are also proficient in another language and that they are serving on a jury in a jurisdiction in which that other language is spoken. Readers should also imagine that some of the evidence in the trial is in English, that this evidence is translated into the native language of the jurisdiction, and that the translation of some key passages seems, based on the readers' knowledge of English, to be clearly wrong. Readers should then ask whether they could say without reservation that they could render a verdict based on the apparently erroneous translation provided in court—even if it seemed to them that a correct translation would dictate a contrary verdict. We suspect that many readers would find it difficult to say that under these circumstances they could unhesitatingly follow the translation offered in court.<sup>40</sup>

The court was quite likely right. Indeed, in the *Hernandez* case itself, petitioner and his *amici* pointed to authority that bilingual jurors “necessarily receive two inputs,” one from the original language testimony and the other from the English-language interpretation, making it impossible to shut out the original testimony.<sup>41</sup> If, indeed, it is inherently impossible for a bilingual juror to comply with instructions to ignore the foreign language testimony, then courts could uniformly strike all bilingual jurors under current case law.

A more interesting question than whether a bilingual juror *could* listen only to English testimony is whether the system *should* so limit her. If we adopt the fiction that an interpretation is an exact translation, then exclusion of bilingual jurors is unjustified, because listening to original foreign-language testimony would be exactly the same as only hearing its English interpretation. If we accept the reality that

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<sup>40</sup> 19 F.3d 857, 867 (3d Cir.), *cert. denied*, 513 U.S. 969 (1994).

<sup>41</sup> Petitioner's Reply Brief at 8, *Hernandez v. New York*, 500 U.S. 352 (1991) (No. 89-7645), available at 1991 WL 538726 (citing to *BERK-SELIGSON*, *supra* note 33, at 167-68 (1990); *Bruton v. United States*, 391 U.S. 123 (1968); *Jackson v. Denno*, 378 U.S. 368, 388-89 (1964)); see also Brief of Amici Curiae Mexican American Legal Defense and Educational Fund et al. in Support of Petitioner at 13, *Hernandez v. New York*, 500 U.S. 352 (1991) (No. 89-7645) (“There is no evidence that bilingual individuals of any type have the ability to switch off one of their language systems.”) [hereinafter *MALDEF Brief*].

all interpretation introduces differences, then the threshold question should be which version(s) of the testimony should be considered.

Application of the principles animating both hearsay and the best evidence rules<sup>42</sup> would suggest that original language testimony is the superior, if not the only acceptable source, over any interpretation or transcription. Compare cases in which sound recordings of conversations, such as wiretaps, are placed before the jury. The recording itself is introduced into evidence and played for the jury; written transcripts of the tape are usually allowed only as aids for the listening jurors, within the discretion of the trial judge.<sup>43</sup> Similarly, we presume testimony by a witness who only heard of an out-of-court interpreter's rendition of a person's statement in a language foreign to the witness is inadmissible hearsay.<sup>44</sup>

Of course, interpretations of in-court testimony by court interpreters are not hearsay because both the original witness and the interpreter are in court, sworn, and the

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<sup>42</sup> See FED. R. EVID. 801-02; FED. R. EVID. 1002. Of course, the misleadingly named "best evidence rule" does not apply to spoken words, only a narrow category of writings, recordings, and photographs. *Id.*

<sup>43</sup> See, e.g., *United States v. John*, 508 F.2d 1134 (8th Cir.), *cert. denied*, 421 U.S. 962 (1975). The court emphasized the safeguards that allowed transcripts to be shown to the jury:

Before distributing the transcripts, the court carefully instructed the jury on their limited use. It directed the jury to use the transcripts only as aids in listening to the recordings and to base its verdict upon what was heard and not upon what was read. Further, the jurors were directed to listen carefully to the declarant's manner and emphasis of speech so as to understand the meaning of what was said. Finally, the transcripts were not made available to the jury during its deliberation.

*Id.* at 1141; see also *Duggan v. State*, 189 So.2d 890 (Fla. Dist. Ct. App. 1966) (finding that written transcripts prepared by court reporter of tape recordings of conversations of defendant were inadmissible under best evidence rule since tape recordings themselves were best evidence, and under hearsay rule where reporter was not present when recordings were made); Daniel E. Feld, Annotation, *Admissibility in Evidence of Sound Recording as Affected by Hearsay and Best Evidence Rules*, 58 A.L.R.3d 598, § 7 (1974 & Supp. 2000).

<sup>44</sup> See, e.g., *Green v. Philadelphia Gas Works*, 333 F. Supp. 1398 (E.D. Pa. 1971), *aff'd*, *Green v. Parisi*, 478 F.2d 313 (3d Cir. 1973) (stating that testimony regarding conversation interpreted outside of court was inadmissible hearsay); see also *State v. Fong Loon*, 158 P. 233, 237 (Idaho 1916) (holding that witness has no personal knowledge and thus is not qualified to testify about statements of another person spoken in a foreign language and translated into the witnesses' language by an interpreter).



witness is subject to cross examination.<sup>45</sup> These usual safeguards of reliability are, however, disabled if all fact-finders are instructed to accept only the interpreters' testimony without reference to the utterances of the witnesses themselves. Ultimately, the choice of interpreted English over the foreign-language testimony cannot be justified on grounds that it is superior evidence, but is better explained as a product of our justice system's fundamental discomfort with accommodating non-English speakers. While a critique of the hegemony of the English language and cultural majorities is beyond the scope of this discussion,<sup>46</sup> it is informative to consider why current courtroom practice suppresses so heavily non-English evidence.

Non-English testimony cannot be excluded on the grounds that it is inaccurate. It is not inherently untrustworthy, or inappropriate for the jury to hear, such as a coerced confession ruled inadmissible on a motion *in limine*. It is not, or at least cannot be constitutionally attacked as being, uniformly indicative of bias or prejudice by a bilingual speaker toward the specific parties or events of a specific case.<sup>47</sup> Regardless of their language ability, jurors with particular knowledge of the case itself or with professed partiality to a

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<sup>45</sup> *Fong Loon*, 158 P. at 237.

<sup>46</sup> See Leslie V. Dery, *Disinterring the "Good" and the "Bad Immigrant": A Deconstruction of the State Court Interpreter Laws for Non-English Speaking Criminal Defendants*, 45 U. KAN. L. REV. 837, 850-51 (1997) ("Immediately below this surface layer of language as the instrument of socialization, lies . . . the related theme that English language dominance in the United States evinces a pervasive and pertinacious nativism among native English speakers directed against non-English speakers."); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 305, 311-15, 351-58 (1986) ("Cultural majorities have sought to force outsiders to conform to the prevailing cultural norms; alternatively, they have sought to dominate and suppress the outsiders, separating them from the public life of the community."); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1212 (1992) ("The present Court has moved away from recognizing language, ethnic, and racial differences as important dimensions of American life and dimensions to be integrated throughout our institutions. Instead, the Court seems to fear differences and to desire to exclude those people it fears.").

<sup>47</sup> See *Pemberthy*, 19 F.3d at 872:

[A] prosecutor cannot strike Spanish-speaking jurors based on a statistical study showing that Spanish-speaking jurors are more likely to be sympathetic to X type of defendants . . . [that] would have little to do with the fact that the jurors spoke Spanish and a lot to do with the fact that most Spanish-speaking jurors are Latino.

particular party or position may always be challenged for cause under traditional voir dire practice.

At worst, accepting jurors with original language understanding might trouble the genuinely race-neutral litigator with the specter of creating a "one-man jury." Among the traditional uses of peremptory strikes is the targeting of jurors with special expertise who are likely to have "an inordinate amount of influence on fellow jurors who are likely to respect his authority," such as doctors in cases with medical issues.<sup>48</sup> However, what little data we have about this phenomenon suggests that bilingual jurors would not assume this role by virtue of mere language comprehension, as opposed to expertise relevant to the substantive content of disputed issues. In addition, the most persuasive figures on juries have "foreman-like" personalities, higher status occupations and incomes, and greater educational experience.<sup>49</sup> While we need empirical research to understand how monolingual and bilingual jurors interact, any risk of "one-man juries" is too speculative to justify exclusion.

Finally, courts may be concerned about the administrability and disorder of a proceeding that accounts for original language testimony. But, as explained in the third option, broader acceptance of this testimony should not require more resources than properly accommodating non-English speakers' testimony already requires of our courts. Ultimately, non-English testimony is excluded because it is opaque, even uncomfortable, to an English-only speaking majority.

#### B. *Screening Bilingual Jurors From Non-English Testimony*

One response to concerns about bilingual jurors who might be conflicted between original and interpreted testimony is to remove mechanically the source of the conflict. Justice Stevens dissented in *Hernandez* in part because he rejected the prosecutor's claim that a peremptory strike was the only solution to bilingual jurors who could not close their ears to

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<sup>48</sup> See FRED LANE, 1 GOLDSTEIN TRIAL TECHNIQUE § 9.55 (3d ed. 1984).

<sup>49</sup> *Id.*; see also JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: GAINING AN EDGE IN QUESTIONING AND SELECTING A JURY 153 (1995).

original language testimony. Accepting the assumption of the supremacy of the English interpretation, Justice Stevens nonetheless found that "the prosecutor's concern could easily have been accommodated by less drastic means," including more rigorous and detailed jury instructions or confining what all jurors heard to a simultaneous English language interpretation, so no juror would ever hear the non-English testimony.<sup>50</sup>

Jury instructions could go beyond rigid admonitions to jurors to heed only the interpreted testimony and to refrain from discussing any doubts they have about the interpreted testimony so as not to unduly influence other jurors. An "even more effective" alternative to jury instructions, Justice Stevens suggests, is to mechanically remove the source of the temptation, that is, to mask any access to the original language testimony.<sup>51</sup> Technology and techniques borrowed from arrangements for other special testimony, such as that of child witnesses, could be adapted to mute the original language testimony from all jurors.<sup>52</sup> These could include videotaping, closed circuit television broadcasts from an adjacent room, special microphone designs, or even putting headphones onto all jurors so only the interpreted testimony is audible.<sup>53</sup>

I agree with Justice Stevens that bilingual jurors will not undermine courtroom proceedings, and that practical and constitutional concerns dictate their accommodation. These methods of accommodating bilingual jurors are at least far less intrusive than striking them from service altogether. However, further distancing jurors from the original language testimony moves in the opposite direction from the best solution. In this case, less is not more. Instead of such intermediate measures, we should step back and reframe our valuation of the original language testimony itself, and fully embrace it.

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<sup>50</sup> *Hernandez*, 500 U.S. at 379 & n.2 (Stevens, J., dissenting).

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., *Maryland v. Craig*, 497 U.S. 836, 840-42 (1990) (allowing child witnesses to testify outside of defendant's presence via one-way closed circuit television).

<sup>53</sup> See Justin B. Denton, *Protecting Both Ethnic Minorities and the Equal Protection Clause: The Dilemma of Language-Based Peremptory Challenges*, 1997 B.Y.U. L. REV. 101, 127-29 (advocating technical procedural solutions to accommodate bilingual jurors).

C. *Allowing All Jurors to Fully Consider the Original and Interpreted Testimony*

My proposal is to acknowledge *both* original foreign language testimony and its English interpretation, allow all jurors to consider both, and preserve both for the record. At least part of this policy can be immediately implemented by judges in their individual discretion over their courtroom proceedings; system-wide procedures could be fairly simply incorporated into administrative practices under current statutes. While *Hernandez* itself might remain on the books, the "race-neutral" reason for striking bilingual jurors would be mooted by the change in definition of what constitutes acceptable evidence. This change will enhance the truth-seeking function of the proceedings, give jurors the full respect and power due their office, and bypass the constitutional thicket of racial discrimination that every strike of a bilingual juror must now attempt to skirt.

This approach is modest, akin to allowing jurors in all-English proceedings to consider audio recordings as well as supplemental or sound-enhanced written transcriptions to aid their comprehension.<sup>54</sup> Any ambiguity introduced by consideration of the *original* version of the testimony is consistent with the ambiguity that we tolerate every day in all-English proceedings. Original English language testimony is given by witnesses and six to twelve jurors all hear it directly, but often differently. Each juror might miss a phrase, misunderstand an accent, fail to recognize slang, hear different emphasis, pick up on sarcasm, or get distracted by physical cues. Each might come away with a different impression of not just a witness, but the content of what that witness said, and the memories of each may change over time, particularly when unaided by notes. Thus, the understanding of each juror may differ from another's and, indeed, from what the court reporter recorded for the official transcript. We do not insist that jurors ignore English testimony as they heard it, in favor of a single

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<sup>54</sup> See Feld, *supra* note 43. Just as the parties and the court must be satisfied as to the accuracy and reliability of the transcription in all-English audio-to-written translations, there must be guarantees of the skills and accuracy of sworn interpreters when language translations are introduced.

official version; nor do reporters read back each word as recorded, so jurors can supplant their memories with the recorded version.

Current practices can be extended to create a record for review in cases involving non-English testimony. Rather than using technology to *reduce* the amount of information given to the jury, as suggested by proponents of screening access to the foreign language testimony, technology could be employed to *enhance* the record. Federal law already requires that, on agreement of the parties in civil proceedings, all proceedings "shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method," subject to Judicial Conference regulations "prescrib[ing] the types of electronic sound recording" or other means that may be used.<sup>55</sup> A uniform requirement that non-English testimony be recorded, and those tapes certified and preserved in case of a dispute, would at least allow for review in cases in which the accuracy or fairness of an interpreter might be material to the outcome of the proceedings.

As in the current system, parties would bring disputes over alleged omissions or misinterpretations in the record first to the district court for conclusive resolution, although the circuit court would continue to retain authority to correct errors in the record or to remand for correction.<sup>56</sup> Allowing challenges to interpreted testimony would allow review of matters currently not, as a practical matter, susceptible to review. This additional burden, like the already accepted encumbrance of requiring interpretation services at all, is a necessary cost of meaningfully accommodating non-English speakers and attempting to understand the facts.<sup>57</sup>

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<sup>55</sup> 28 U.S.C. § 753(b) (2000). In criminal cases, the creation of a transcript is mandatory unless the proceedings have been recorded by electronic sound recordings certified and filed with the clerk. JAMES W. MOORE, 12 MOORE'S FEDERAL PRACTICE § 310.20 (3d ed. 2000) (Court Reporter's Duties).

<sup>56</sup> FED. R. APP. PROC. 10(e); see also MOORE, *supra* note 55, at § 310.40 (Authority to Settle Disputes Concerning Record).

<sup>57</sup> Although the requirement of meaningful access under the Constitution's due process guarantee could arguably encompass such record-keeping as an incident to fair proceedings, it is unclear that such rights would extend to review. Cf. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (conditioning review of parental termination on ability to pay transcript fees violates Due Process and Equal Protection Clauses). It is difficult to predict the number of collateral proceedings that would be brought to challenge interpretations. Most errors would be challenged contemporaneously, and practical

This inclusive approach provides compelling advantages over alternative methods of coping with non-English testimony. It embraces all witnesses' direct and original testimony, rather than irrationally discarding non-English statements as meaningless. Typically, translation of witness testimony is sequential. By instructing all jurors to concentrate on both the original and interpreted testimony, they remain more continuously engaged. They will also consider the totality of testimony, allowing them to more fully consider the demeanor and non-verbal expressions of witnesses in order to make those fundamental credibility determinations discussed by Shari Seidman Diamond in this symposium.<sup>58</sup> Inclusion is a marked advantage over approaches that attempt to direct the jurors' attention away from the non-English speaking witness. By privileging neither the foreign language nor English versions, each juror may consider everything that helps her best understand the testimony.

Bilingual jurors who can listen to the original testimony and assist the court if the interpreter falls short will improve the chances that errors will come to the court's attention for a quick and timely clarification. Jury instructions and the experiences of lower courts that do allow bilingual jurors to sit are instructive. For example, one court instructed a multilingual panel:

The Court recognizes that some of the jurors may be able to understand Spanish, and your own ears will tell you what you hear. This witness is testifying through an interpreter, but if those of you who can in fact understand Spanish hear certain words differently than you understand the interpreter to relate them, then you may, when the witness is finished with his testimony, you may place your question, you may raise the question that you have with the Court. If the Court feels that it is a question that can be properly answered, then the Court will take care of attempting to get it answered.<sup>59</sup>

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constraints on parties' resources likely would winnow subsequent challenges to the record to the grossest errors.

<sup>58</sup> Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121 (2001).

<sup>59</sup> *United States v. Perez*, 658 F.2d 654, 662-63 (9th Cir. 1981) (using instructions to jury that included bilingual jurors). While the plurality of the *Hernandez* Court characterized the juror dispute later raised in this case as a "problem[]," 500 U.S. at 360 n.3, Justice Stevens cited it with approval as an example of how jurors could follow instructions and bring disputes to the court for resolution.

Introducing accountability increases the incentives of the court and interpreters to provide accurate services and encourages resources that are already being devoted to interpretation services to be utilized most effectively. These gains in accuracy and fairness also reduce any burden of allowing review of dual testimony.

In addition to accuracy, another important reason to implement this policy is to allow jurors to realize their full value in the courtroom. As Akhil Amar has commented, jurors represent themselves and the people; they should not be mere expressions of the parties' rights, subject to the arbitrary or disparate use of peremptory strikes.<sup>60</sup> If we conceive of the jury system as an incident to universal suffrage and as a political institution in its own right, then we must strive for inclusion, allowing all jurors to sit free from discrimination not just on the basis of race, ethnicity, or sex, but also free from exclusions for possessing knowledge short of specific personal knowledge of the controversy or individual bias.<sup>61</sup> The facial argument for exclusion of bilingual jurors in the current system is not based on fear of improper bias, but on the risk that a juror will not comply with irrational instructions. Thus, regardless where we ultimately draw the line for appropriate strikes for bias,<sup>62</sup> jurors with bilingual skills (not otherwise personally biased) should rationally fall into the category of people who are seated; they can bring skills and perception to the fact-finding process. Exercise of these skills is no different from what we

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*Id.* at 379.

<sup>60</sup> See also Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995) ("Juries should represent the people, not the parties."); Vikram D. Amar, *Jury Service as Political Participation, Akin to Voting*, 80 CORNELL L. REV. 203 (1995) (arguing that jury service is a political right).

<sup>61</sup> Of course, if voir dire revealed such individual biases, these individuals would remain subject to strikes for cause upon the lawyer's articulation of such reasons on the record.

<sup>62</sup> Compare Akhil Amar, *supra* note 60, at 1182-83 (advocating elimination of the peremptory challenge), with Shari Seidman Diamond, et al., *Juries: Arbiters or Arbitrary?: Redefining the Role of the Jury: Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J.L. & PUB. POL'Y 77, 83-95 (1997) (arguing that empirical data support a system of extensive voir dire combined with preemptory challenges to create more "impartial" juries), and Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and A Proposal for Change*, 74 B.U. L. REV. 777, 806-18 (1994) (proposing a system of affirmative preemptory challenges for inclusion of diverse jurors).

ask English-speaking jurors to do each day, namely to consider nuances of language and idiom and behavior, judge credibility, and bring common sense and a knowledge of the world rationally to bear on decision making. In turn, these jurors can add to the educative experience of jury service and share in its power.

The full range and richness of what bilingual citizens can bring to juries need not be quantified exactly. In the most mechanical sense, they bring immediate technical skills to assist our courts through the growing pains of adapting to increasing multilingual demands. Although there is no exact congruence of language and ethnicity or culture, the disproportionate correlation of bilingualism and protected classes means, as a practical matter, that inclusion would bring a potential for greater diversity to juries.<sup>63</sup> This inclusion of voices, in turn, can alter the decision-making process in subtle ways that need not necessarily correlate with particular points of view.<sup>64</sup> Finally, this inclusion combats the often invisible systems of privileging the viewpoints and voices of

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<sup>63</sup> As the Court knew when it decided *Hernandez*, most Hispanics in the United States are Spanish-speaking. MALDEF Brief, *supra* note 41, at 3, 8-9 ("97% of individuals who usually speak Spanish are Hispanic; 72% of all Hispanics claim some level of knowledge of Spanish; and 64% of all Hispanics report being bilingual."). The Fifth Circuit was quite blunt about this correlation, "It may be that in certain, or even most, situations in Texas striking [based on Spanish-speaking ability] would be the equivalent of or a pretext for prohibited striking for ethnicity." *United States v. Munoz*, 15 F.3d 395, 399 (5th Cir. 1994).

<sup>64</sup> The empirical work of scholars such as those present at "The Jury in the Twenty-First Century" symposium indicates the very real effects of racial/ethnic diversity on juries. See generally Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704 (1995); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993). In any event, the interplay of race, ethnicity, and viewpoint need not be correlated exactly to be acknowledged by our courts. Cf. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 579 (1990):

The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping . . . . The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in *Bakke* that greater admission of minorities would contribute, on average, to the "robust exchange of ideas."



racial and language majorities and strengthens the legitimacy of the institution of the jury.<sup>65</sup>

With these suggestions in mind, here is the start of my research wish list; please heed the urgings of "The Jury in the Twenty-First Century" symposium organizers and add your suggestions. We need to know more about:

- The current and forecast language needs of courts and their players.
- The pitfalls of interpreting particular ideas or vocabulary, particularly legal concepts, in specific languages.<sup>66</sup>
- Interpreters and how to effectively train them for both sequential and simultaneous interpretation in courtroom settings.
- Whether current training addresses needed skills.
- Whether current testing and certification measures needed skills.
- How to measure the accuracy of interpretations. Methods for systematically auditing courtroom interpreters should address both gaps in the quantity of coverage and alterations in the quality or meaning of interpretations.

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<sup>65</sup> See *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975) (denying disqualification of a female judge from a Title VII sex-discrimination case on the basis of bias, noting that under defendant's reasoning no judge could hear a discrimination case, as all judges have a sex and a race); accord *Minow*, *supra* note 46, at 1207 (a different view of bias and impartiality exposes "the assumption that the neutral baseline against which to evaluate bias is the vantage point of a white male"). On the benefits of diversity on juries see, e.g., Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 360-65 (1999) (arguing that representativeness improves the quality of decision making, enhances the political legitimacy of juries as a democratically inclusive institution, and educates jurors about civic participation).

<sup>66</sup> See, e.g., the Hmong word for "rape," Hammond, *supra* note 28.

- How bilingual jurors process and comprehend simultaneous and sequential testimony in two languages.
- What communicative aspects of testimony jurors gain from hearing and observing live testimony, even if they cannot comprehend the language used.
- How frequently, and in what ways, English-speaking jurors differ from each other and from the court reporter's transcript in understanding English-language testimony.
- Whether bilingual jurors are likely to dominate in deliberations if non-English testimony is presented.
- Whether jurors will heed instructions regarding disagreement or clarification of testimony, or discussion of interpretations with fellow jurors. Do instructions work?
- Whether and how bilingualism in various languages might overlap or correlate with race/ethnicity and cultural perspective.

## CONCLUSION

In conclusion, I want to underscore the point several symposium participants have made: the jury has lost power in recent years. That loss is particularly significant for minority jurors and defendants who have only recently won the formal right to participate in our justice system free from discrimination. It is ironic that Latino/as were recognized as an ethnic minority under the Fourteenth Amendment in 1954 when the practice of barring Mexican Americans from jury service was struck down in the case of *Hernandez v. Texas*.<sup>67</sup>

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<sup>67</sup> *Hernandez v. Texas*, 347 U.S. 475 (1954) (holding that persons of Mexican descent were a separate class distinct from whites in the community in question, and

Less than four decades later, in the 1991 *Hernandez* case, the same Court told these very same people, having won the right to sit on juries, that they now knew too much to serve.<sup>68</sup> This exclusionary policy reduces the resources of our justice system by excluding precisely those most able to address the growing needs of our multilingual courts. The "Jury of the Twenty-First Century" must face demographic realities, and reflect the richness of our present and future multilingual society.

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that there had been a systematic exclusion of Mexican Americans from jury service in violation of the Constitution).

<sup>68</sup> The pendulum has swung back in many aspects of jury service and political participation. *See, e.g.*, Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1276-95 (2000) (stating that non-unanimous jury decision making in criminal trials could jeopardize the victories that historically excluded groups have won in cases challenging barriers to jury service).